In the

Supreme Court of the United States

October Term, 1976

No. 75-1807

THE STUART MCGUIRE COMPANY, INC.
Appellant,

v.

WILLIAM H. FORST,
STATE TAX COMMISSIONER, et als
Appellees.

MOTION TO DISMISS

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The Appellees, William H. Forst, State Tax Commissioner, Frank W. Lewis, Director, Sales and Use Tax Division and Virginia Department of Taxation, by counsel, pursuant to Rule 16(b) of this Court, respectfully move the Court to dismiss this appeal on the following grounds:

(1) That it does not present a substantial federal question, and
(2) That the judgment entered below rests on an adequate non-federal basis.

The facts and legal authorities in support of this motion are set forth herein, following the designations contained in the Appellant's jurisdictional statement.

JURISDICTION

28 U.S.C. § 1257(2) does not confer jurisdiction in this case. Although several Virginia statutes are involved in the proceedings, and although the Appellant has made constitutional arguments concerning them, the case presents no substantial federal question and should be dismissed. The doctrines enunciated in *Sniadach* v. *Family Finance Corp.* 395 U.S. 337 (1969), its progeny, and *Commissioner* v. *Shapiro,* ____ U.S. ____ (No. 74-744) 44 USLW 4313 (1976) are inapplicable to this proceeding to invalidate a bond securing payment of assessed state sales and use taxes, which the appellant voluntarily agreed to post, in order to gain release of tax liens encumbering its bank accounts. The decision below, furthermore, rests upon an adequate non-federal basis; namely, the trial court's factual finding that the Appellant was afforded an adequate remedy at law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appellant asserts that this case involves the constitutionality, under the Fourteenth Amendment Due Process Clause, of § 58-1010 of the Code of Virginia (1950) as amended. Section 58-1010 provides:

> "Any person indebted to or having in his hands estate of a person assessed with taxes or levies may be applied to in writing by the officer for payment thereof out of such debt or estate and a payment by such person of such taxes or levies, either in whole or in part, shall entitle him to a charge or credit for so much on account of such debt or estate against the party so assessed. From the time of the service by such officer of any such application, the taxes and levies shall constitute a lien on the debt so due from such person or on the estate in his hands. If the person applied to does not pay so much

> as may seem to the officer ought to be recovered on account of the debt or estate in his hands, the officer shall . . . procure from the clerk of the circuit court of the county or corporation court of the city a summons directing such person to appear before such court on the first day of the next term thereof . . . ."

Section 58-1010 constitutes the underlying authority of the Department of Taxation to acquire a lien on an assessed taxpayer's assets in the hands of third parties. Sections 58-1118, 58-1119 and 58-1130 provide for administrative and judicial review whenever a taxpayer is aggrieved by an assessment of state taxes regardless whether the assessment has been paid. Section 58-1158 prohibits injunctions restraining the assessment and collection of state taxes whenever the aggrieved party has an adequate remedy at law. Section 58-441.32 permits a jeopardy assessment of sales and use taxes.

Neither § 58-1010 nor §§ 58-441.32, 58-1118, 58-1119, 58-1130 and 58-1158 are directly involved in the case. The Appellant sought a mandatory injunction (Appendix, pp. 1 *et seq.*) permitting cancellation of a bond which it had voluntarily posted under an agreement with the Department of Taxation. The bond was not given pursuant to any of the foregoing statutory provisions.

QUESTION PRESENTED

This case turns on whether Appellant, having once voluntarily given its word in an agreement to post bond, may now renege to the detriment of the Department which relied on its representations. The Appellant agreed to post the bond to secure the ultimate payment of whatever sales and use taxes might finally be determined to be due as a result of litigation. In return, the Department agreed to release its

liens on the Appellant's bank accounts. Appellant's agreement, and the nature of this case as a proceeding to permit cancellation of the bond, prohibit the Appellant from questioning the constitutionality of the Department's prior assertion of a tax lien on Appellant's bank accounts under § 58-1010, which has subsequently been released.

If the Appellant had appealed a case in which its due process allegations could properly be considered, the questions presented would be as follows:

> (1) Whether acquiring a lien for the collection of assessed but unpaid state taxes prior to a hearing on the taxpayer's liability therefor presents a substantial federal question in the light of this Court's decisions distinguishing *Sniadach, Fuentes* and other creditor collection cases from cases involving the assessment and collection of governmental revenue, and
>
> (2) Whether the lower court decision rests on an adequate non-federal basis when it dismissed the taxpayer's claim to a pre-lien hearing on the factual grounds of an adequate remedy at law?

Although the Appellant's due process issues are not properly before the Court, the Appellees will address these questions herein.

STATEMENT OF THE CASE

Certain relevant facts have been omitted or de-emphasized in Appellant's statement of the case. Some of these are as follows:

The sales and use tax audit which gave rise to this proceeding was conducted with advance notice and full knowledge of the Appellant. Once the audit deficiency was tentatively determined, the Appellant was notified and given numerous opportunities to discuss it with the auditors

and administrative personnel employed by the Department of Taxation. The Appellant availed itself of these opportunities. Pursuant to § 58-1118 of the Code of Virginia (1950) as amended, the Appellant filed an Application for Correction of Erroneous Assessment with the State Tax Commissioner, and was accorded a full hearing. The Commissioner found it necessary to deny the Application. Pursuant to § 58-1130 of the Code of Virginia (1950) as amended, the Appellant filed an application with the Circuit Court for the City of Salem, Virginia, seeking correction of the allegedly erroneous assessment. To date, the Appellant has made no effort to bring that case to trial, although it involves the merits of its claim that the assessment is erroneous.

No provision of State law permits taxpayers to withhold payment of assessed sales and use taxes on the grounds that they dispute owing the tax. Both § 58-1118 and § 58-1130 provide for hearings and relief from erroneously assessed taxes whether paid or unpaid. On facts such as those involved in this case, the Department requires that taxpayers pay the tax, and pursue their remedies in proceedings brought pursuant to § 58-1118 and § 58-1130. Specific statutory provisions authorize refunds, with interest, in the event of a final determination that no tax, or a lesser amount is owed. See, e.g., § 58-1119 (authorizing the Commissioner to order a refund on an administrative application), § 58-1134 (authorizing a Court to order a refund on a judicial application), and § 58-1140.1 (requiring State payment of interest on such refunds).

In the present case, after it became clear that the Department could not accept Appellant's contention that the assessment was erroneous, the Appellant was advised that it would be necessary to pay the assessed taxes and seek a

refund. The Appellant refused, taking the same position it took below, and now takes before this Court; that as long as an assessment is contested, it need not be paid. Finally, the Department notified the Appellant that, if it did not promptly pay the assessed taxes, enforced collection would ensue. When payment was still not forthcoming, the Department served the lien on Appellant's bank accounts which is the subject of this proceeding. *None of the Appellant's property was seized or disposed of by the Department pursuant to the lien.*

After the lien was filed, the Appellant became more conciliatory. It entered discussions with the Department to explore what could be done to secure release of the lien. The Appellant still refused the Department's requests to pay the assessed tax and seek a refund, but an agreement was ultimately reached under which the Appellant posted the bond which is the subject of this litigation. Importantly, the bond was a matter of agreement between the parties, and not a "requirement" of the Department as suggested by the Appellant. When the bond was posted, the lien was released. Shortly thereafter, the Appellant filed this action seeking judicial permission to dissolve the bond. The Appellant's description of the subsequent litigation is essentially correct, except that the Trial Court's decision in favor of the department, (J.S. A-1 et seq.) rests on a factual determination that the Appellant had an adequate remedy at law.

ARGUMENT

I.

No Substantial Federal Question Is Presented Because Due Process Does Not Require Notice Or A Hearing Before Filing Of Liens To Collect An Assessed State Tax, And § 58-1010 Is Constitutional.

It is a recognized requirement of Due Process that, at some stage before a tax becomes *irrevocably* fixed as a charge on a taxpayer's property, he must be given notice and an opportunity to be heard regarding the liability. *See, Security Trust & S. V. Co.* v. *Lexington,* 203 U.S. 323 (1906). As applied to proceedings for the collection of taxes, however, the requirements of due process have historically been considered more summary in character and necessarily less formal than the due process requirements applicable to cases of a judicial character. *King* v. *Mullins,* 171 U.S. 404 (1898). Due process does not require judicial review *before* efforts to collect a tax are begun, and even a taking in excess of the actual amount of indebtness does not deny due process provided proper opportunity is afforded for correction. *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors,* 221 U.S. 346 (1911). It is sufficient if the taxpayer has a single opportunity to be heard before an impartial tribunal with respect to the validity and amount of the tax before liability is *conclusively* established against him. *See, Nickey* v. *Mississippi,* 292 U.S. 393 (1934); *McGregor* v. *Hogan,* 263 U.S. 234 (1923); *Turner* v. *Wade,* 254 U.S. 64 (1920). A taxpayer is accorded due process if he has notice and an opportunity to be heard either before or after a tax lien is fixed on his property. *Gallup* v. *Schmidt,* 183 U.S. 300 (1902); *Hodge* v. *Muscatine County,* 196 U.S. 276 (1905); *Maxwell* v. *Page,* 23 N.M. 356, 168 P. 492.

This Court has recently considered the due process ramifications of property seizure prior to a hearing in *Laing* v. *United States,* ____ U.S. ____, 96 S.Ct. 473 (1976) albeit in the context of a jeopardy assessment of Federal taxes by the Internal Revenue Service. Mr. Justice Marshall, writing for the Court, expressly reserved consideration of the taxpayers' claim of a denial of due process because of a lack of notice and a hearing. ____ U.S. ____, 96 S.Ct. 473, 485 n.26 (1976). *Phillips* v. *Commissioner,* 283 U.S. 589 (1931) had previously held that no denial of due process arises under such circumstances. In a dissenting opinion joined by the Chief Justice and Mr. Justice Rehnquist, however, Mr. Justice Blackmun addressed the constitutional issue as follows:

> "It has long been established, . . . that there is no constitutional requirement for a prepayment forum to adjudicate a dispute over the collection of a tax. *Phillips* v. *Commissioner of Internal Revenue,* 282 U.S. 589, 595-596, 51 S.Ct. 608, 611, 75 L.Ed. 1289 (1931). There, is an opinion by Mr. Justice Brandeis, the Court unanimously held that the taxing authorities may lawfully seize property for payment of taxes in summary proceedings prior to an adjudication of liability where 'adequate opportunity is afforded for a later judicial determination of the legal rights.' Id., at 595, 51 S.Ct., at 611. *See Fuentes* v. *Shevin,* 407 U.S. 67, 91-92, 92 S.Ct. 1983, 1999-1920, 32 L.Ed.2d. 556, and n. 24 (1972)."

"In *Phillips* the Court noted the availability of two alternative mechanisms for judicial review in that particular situation; a refund action, or immediate redetermination of liability by the Board of Tax Appeals. In response, however, to a complaint by the taxpayer there that if the Board remedy were sought, collection would not be stayed unless a bond were filed,

Mr. Justice Brandeis dismissed the contention with the observation:

> '[I]t has already been shown that the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery is paramount. The privilege of delaying payment pending immediate judicial review, by filing a bond, was granted by the sovereign as a matter of grace solely for the convenience of the taxpayer." 283 U.S., at 599-600, 51 S.Ct., at 612.'

"Thus, the Court made clear that a prepayment forum was not a requirement of due process. I see no reason whatsoever to depart from that rule in these cases, where the taxpayer may file an action for refund after at most six months from the seizure of his assets or other action taken by the IRS under § 6851."

Mr. Justice Stevens did not participate in the decision of the case.

The foregoing authorities establish that there is no due process requirement of notice or a hearing prior to a seizure of property for assessed state taxes where there is a subsequent opportunity to be heard before the tax is finally determined to be due.

The Appellant misstates the operative principles of this case throughout its jurisdictional statement. First, it argues (J.S. 7-14) that this tax collection case is governed by the more stringent due process standards which apply to creditor collection proceedings, although this Court has historically recognized that due process is more summary in character and less formal in tax proceedings. *King* v. *Mullins,* supra. Secondly, it asserts (J.S. 8) that the relationship between taxpayer and sovereign is a mere debtor-creditor relationship, despite the fact that it consists of a mandatory statutory obligation to pay, rather than a con-

tractual undertaking involving mutual consent and a meeting of the minds. Thirdly, it ignores, under guise of "distinguishing", this Court's holding in *Phillips*, supra, which was reinforced by the decision in *Laing* rendered at the October 1975 term. Finally, Appellant's contentions, if correct, would permit a taxpayer to defer payment of any assessed state tax for substantial periods of time by litigating frivolous issues. Existing law imposes no requirement of notice and a hearing before collection of state taxes. Such an extension of due process as is urged by the Appellant would seriously impair collection of state revenues, and should be rejected.

II.

Virginia's Statutory Provisions For Notice And A Hearing Satisfy The Requirements Of Due Process.

In the present case, two crucial factors insulate the Department's filing of its tax lien from any serious due process challenge. First, the mere filing of a tax lien, without more, does not constitute a seizure of the Appellant's property. No lien foreclosure proceedings were ever instituted against Appellant's accounts. None of Appellant's property was sold pursuant to the lien. None of Appellant's funds came into the possession of the Department. No notice or a hearing was required at such an early stage in the collection proceedings. Secondly, Virginia law specifically provides for administrative *and* judicial hearings prior to a final determination of the Appellant's tax liability. Section 58-1118 (J.S. A-14) provides for administrative hearings before the State Tax Commissioner. Section 58-1130 (J.S. A-15) provides for a hearing of all issues related to assessments of state taxes before a state circuit court. These provisions offer ample opportunity for taxpayers to advance all contentions

regarding an assessment, and the assessment only becomes final when finally decided by the Court, or when the two year period for filing a judicial application lapses. Appeals to the Virginia Supreme Court, and to this Court, are permissible.

A most important aspect of hearings under §§ 58-1118 and 58-1130 is the fact that they are not limited to post-collection review. There is no jurisdictional prerequisite, similar to that applicable to District Courts and Courts of claims in the Federal System, that the taxpayer must pay the tax in order to seek review. An assessment is all that is required. In the present case, the Appellant has not paid the tax, yet it has utilized the procedures under § 58-1118 and § 58-1130 without jurisdictional challenge.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case presents no substantial federal question and that this appeal should be dismissed.

WILLIAM H. FORST,
State Tax Commissioner,

FRANK W. LEWIS, *Director,*
Sales and Use Tax Division,
Virginia Department of Taxation,
Appellees,
By Counsel

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Counsel for Appellees.

APPENDIX

IN THE CIRCUIT COURT FOR THE
CITY OF SALEM

(CAPTION OMITTED)

AMENDED BILL FOR INJUCTION

To: The Honorable Judges of Said Court:

COMES NOW the Plaintiff, The Stuart McGuire Company, Inc. (hereinafter referred to as "Company"), and hereby brings this Amended Bill for Injunction and prays that this Court enjoin and cause the above named Defendants to allow the Company to cancel a certain bond, with surety, which the Defendants have caused the Company to give them, and in support of its cause, the Company states as follows:

1. The Company, incorporated in 1926, is in good standing pursuant to the laws of the Commonwealth of Virginia and has its principal executive offices at 115 Brand Road, Salem, Virginia.

2. The Company is a wholesaler of shoes and clothing. It sells and distributes a broad line of wearing apparel, including a large selection of men's and women's dress and service shoes, a variety of men's and women's clothing, and miscellaneous accessories such as home furnishings, hosiery, handbags and belts. Shoes for men and women long have been and are the principal items of apparel sold by the Company.

3. The Company has approximately 200,000 sales solicitors throughout the United States, the vast majority of whom are members of minority groups. The sales solicitors sell the Company's products on a full or part-time basis in their neighborhoods. More than one half of the Company's merchandise is shipped to urban areas throughout the United States and its Possessions or to posts of the Armed Forces

overseas. Only a small fraction of the sales solicitors reside within the Commonwealth of Virginia and only a small fraction of the shipments made by the Company are sent to destinations within the Commonwealth of Virginia.

4. The Defendant, William H. Forst (hereinafter referred to as "Commissioner"), is the State Tax Commissioner, Virginia Department of Taxation, and as such supervises and has direct responsibility for the assessment and collection of taxes by the Virginia Department of Taxation.

5. The Defendant, Frank W. Lewis (hereinafter referred to as "Director"), is Director of the Sales and Use Tax Division of the Virginia Department of Taxation, and as such has responsibility for the assessment and collection of use taxes by said Division.

6. The Defendant, Virginia Department of Taxation (hereinafter referred to as "Department of Taxation"), is that agency of the Commonwealth of Virginia charged with the constitutional and statutory duties of assessing and collecting tax revenues lawfully determined to be due said Commonwealth.

7. On May 20, 1974, the Defendant, Department of Taxation, by and through the Division of Sales and Use Taxes, assessed the Company with unpaid use taxes in the sum of $197,287.50.

8. The Company has vigorously denied its liability for said taxes in numerous conferences with and letters to the Sales and Use Tax Division of the Department of Taxation and has, pursuant to Section 58-1118, Code of Virginia (1950), as amended, applied for relief from the alleged wrongful assessment to the Commissioner. Said relief was denied by the Commissioner by letter to counsel for the Company dated September 18, 1974, even though the assessment has no basis in fact or law.

9. The Company, before making said application to the Commissioner, had informed Defendants that it intended to apply to the proper Circuit Court of this Commonwealth for relief from the alleged wrongful assessment pursuant to Section 58-1130, Code of Virginia (1950), as amended. After denial of the aforesaid application, the Company again informed Defendants that it would apply to the Court for relief pursuant to said Section of the Code.

10. Notwithstanding the fact that the Defendants were aware that the Company planned to apply to the proper Court for relief and before the Company could apply for such relief, the Defendants, without notification to the Company, on October 18, 1974, served notices of liens on The Farmers National Bank of Salem, Virginia, and First and Merchants National Bank, Richmond, Virginia, allegedly pursuant to Section 58-1010, Code of Virginia (1950), as amended, which said liens froze the accounts of the Company therein.

11. Subsequent to the service of the aforesaid notices of liens and in order for the liens to be removed, the Defendants required the Company to post a bond with corporate surety thereon in the sum of $250,000, all before there had been an impartial letermination by the Courts of this State that the taxes assessed were owed by the Company. A copy of said bond is attached hereto, marked "Exhibit A", and hereby made a part of this Bill.

12. Counsel for the Company then went to Richmond and again discussed the said liens and bond with the Director but was notified by the Director, by letter dated November 1, 1974, from the Director, that it was the position and policy of the Department of Taxation, although there is no statutory authority therefore, to begin the collection procedures immediately after denial of relief by the Com-

missioner, without benefit of adjudication by an impartial judicial tribunal.

13. Since its incorporation in 1926, the Company has paid its taxes to the Commonwealth when due, and, since the enactment of the Virginia Retail Sales and Use Tax in 1966, the Company has never been assessed until the present time with use or sales taxes.

14. At no time have the Defendants questioned the financial ability of the Company to pay the tax assessed, and in fact, the present financial position of the Company is such that it will be able to pay the assessed tax if it is determined that the tax is owed. There was and is, therefore, no reason in law or equity why the Defendants' actions against the Company should have been and are being taken.

15. The Company has not, in any manner whatsoever, attempted to hide or secrete its assets, defraud the Defendants or otherwise frustrate the ability of the Defendants to collect the taxes assessed if it should be ultimately determined that the taxes are owed, nor have any of the Defendants so alleged.

16. The placing of liens against the Company's bank accounts and the subsequent requirement of a bond with surety have irreparably injured and damaged the Company and will continue to do so in many ways, including, but not limited to, the following:

a. Some employees of the Company have become apprehensive about their own financial security, and such fears have greatly impaired the Company's operations at its peak period, to wit, immediately prior to the Christmas selling season, and said impairment continues to this day.

b. The establishment and maintenance of a suitable liquidity or cash position is crucial to the continuing successful operation of the Company. Both banks upon which the

aforesaid notices of liens were served are financial institutions which furnish the Company with lines of credit, and the Defendants' actions have caused and will cause said institutions and other financial institutions to question the financial responsibility of the Company and will impair the credit of the Company.

c. The actions of the Defendants have been or will be reported to the suppliers and creditors of the Company by Dun & Bradstreet, a financial reporting service, thus impairing the Company's historical and necessary credit terms and threatening a liquidity crisis, especially because the largest competitor of the Company, with many of the same suppliers as those of the Company, recently went into bankruptcy pursuant to Chapter X of the Bankruptcy Act.

d. The Company is presently under contract with the Peoples Republic of China to purchase quantities of shoes and because of the effect of the Defendants' actions upon the credit rating of the Company, the ability of the Company to fulfill its obligations under the contract has been jeopardized.

e. The use tax assessed in this case, the aforesaid liens and the bond with surety required subsequent thereto have caused the Company to begin complete removal of its catalog shipment facilities from the City of Salem and State of Virginia to another state which views such activity more favorably and which is more desirous of fairly encouraging commerce within its borders.

f. The Company has had and will have to keep in effect a surety bond with a yearly premium in excess of $3,000.

g. The goodwill and reputation of the Company have been forever destroyed and ruined.

17. The actions of the Defendants in serving the aforesaid notices of liens and subsequently thereto requiring a bond

with surety in lieu of said liens were and are illegal in that had the Defendants felt themselves to be unsecure in the ability of the Company to pay the tax, if owed, and so desired to collect the tax before a judicial determination could be made, they should have attempted to use the "jeopardy assessment" procedure pursuant to Section 58-441.31, Code of Virginia (1950), as amended.

18. The actions of the Defendants in serving the aforesaid notices of liens and subsequently thereto requiring a bond with surety in lieu of said liens were and are illegal in that Section 58-1010, Code of Virginia (1950), as amended, was the improper collection procedure to be used because Section 58-441.36, Code of Virginia (1950), as amended, is the procedure which should have been attempted.

19. The actions of the Defendants in serving the aforesaid notices of liens and subsequently thereto requiring a bond with surety in lieu of said liens were and are illegal in that the laws of this Commonwealth do not provide that assessments may be collected before liability is determined by an impartial judicial tribunal.

20. The actions of the Defendants in serving the aforesaid notices of liens and subsequently thereto requiring a bond with surety in lieu of said liens before a judicial determination of liability was made were and are illegal because said actions deny the Company due process of law pursuant to Article I, § 11 of the Virginia Constitution and Amendment XIV of the United States Constitution.

21. The Company has no adequate remedy at law.

WHEREFORE, the Company prays that this Court:

1. Issue a mandatory injunction against the Defendants which will allow the Company to cancel the bond with surety given the Commissioner and further enjoin the Defendants from attempting to collect their assessment until

the liability of the Company for said assessed taxes can be determined by the proper judicial authority; and

2. Award whatever further relief the Court may deem meet and just.

THE STUART MCGUIRE COMPANY, INC.

By: .....
Charles F. Barnett, Jr.

Martin, Hopkins and Lemon
By: Charles F. Barnett, Jr.
Sixth Floor, Boxley Building
Roanoke, Virginia 24005
703/982-1000
Counsel for Plaintiff

CERTIFICATE

I hereby certify that I have, this 25th day of April, 1975, mailed a true and correct copy of the foregoing Amended Bill for Injunction to Charles K. Trible, Esquire, Assistant Attorney General, Post Office Box 6-L, Richmond, Virginia 23219, Counsel of Record for the Defendants.

.....
Charles F. Barnett, Jr.